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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	86311033
Applicant	Mischief Brewing Company, LLC
Applied for Mark	RICHTER
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE
TRADEMARK TRIAL AND APPEAL BOARD**

Mark: Richter

Applicant: Mischief Brewing Company, LLC

Examining Attorney: Tina L. Snapp
Law Office 116

Serial No.: 86/311,033

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EX PARTE APPEAL

APPLICANT'S BRIEF

I. Issue on Appeal

Applicant seeks to register the RICHTER mark in International Class 32 for beer. The Examining Attorney has refused registration under Section 2(e)(4) on the ground that RICHTER is primarily merely a surname.

The only issue on appeal is whether, in connection with the applied for goods, Applicant's mark is primarily merely a surname. Here, the record demonstrates that the RICHTER mark is not primarily merely a surname and is worthy of a federal registration.

II. Argument

A. The Examiner has not met its burden in proving that Applicant's mark is primarily merely a surname.

The burden is on the Examining Attorney to establish a prima facie case that a mark is primarily merely a surname. TMEP § 1211.02(a); *see In re Petrin Corp.*, 231 USPQ 902, 902-03 (TTAB 1986); *In re Kahan & Weisz Jewelry Mfg. Corp.*, 184 USPQ 238 (CCPA 1975). This question is decided on a case-by-case basis. TMEP § 1211.02(a); *see, e.g., In re Monotype Corp. PLC*, 14 USPQ2d 1070 (TTAB 1989); *In re Pohang Iron & Steel Co.*, 230 USPQ 79 (TTAB 1986).

The primary significance of the mark to the purchasing public determines whether a term is primarily merely a surname. *In re Kahan & Weisz Jewelry Mfg. Corp.*, 508 F.2d 831, 832, 184 USPQ 421, 422 (C.C.P.A. 1975); *In re Binion*, 93 USPQ2d 1531, 1537 (TTAB 2009); *see* TMEP §§1211, 1211.01. The evidence provided by the Examiner in demonstrating Applicant's mark was primarily merely a surname included: 100 listings for persons holding the "Richter" surname; 7 references of persons with the "Richter" surname; and 28 USPTO files. September 29, 2014 Office Action, TSDR 2-21, November 18, 2014 Office Action, TSDR 24-112. These

records do not establish that the consuming public would view Applicant's mark as primarily merely a surname.

First, the Examiner also included 10 references relating to individuals with the surname "Ritcher" as evidence that Applicant's mark is primarily merely a surname. November 18, 2014 Office Action, TSDR 2-23. These references demonstrate that the Examiner had not met the burden in establishing the *prima facie* case because searched the wrong surname when prosecuting the mark. These references show the common surname "Ritcher," which Applicant concedes has the "look and sound" of a surname. However, that is not Applicant's mark. Applicant's mark is RICHTER. The Examiner's inadvertence shows the rarity of the surname "Richter" and that it does not have the "look or sound" of a surname.

Second, the Examiner maintained the refusal of registering Applicant's mark because of the decisions of other previous Examiners when prosecuting applications in which "Richter" was included in the trademark application. November 18, 2014 Office Action, TSDR 37-103. This evidence included applications in which the applicant's surname was "Richter" and the mark featured the "Richter" term. However, given that there are 24 registrations across a variety of International Classes featuring RICHTER as a part of the mark, it appears that the term is unique and the purchasing public would not view the term to be primarily merely a surname. October 27, 2014 Response to Office Action, Exhibits A-B.

Finally, the Examiner failed to weigh the *Benthin* factors correctly. The Examiner acknowledged Applicant's evidence showing the rarity of the surname, alternative meanings for the surname, and that it did not have the "look and sound" of a surname. November 18, 2014 Office Action, TSDR 1. The Examiner then used Applicant's evidence against them in making the final rejection. *Id.* Had the Examiner properly analyzed and balanced the *Benthin* factors,

Applicant's mark should have been issued a registration. Applicant provided an abundance of evidence, in accord with previous Board rulings in which the applicants overcame a Section 2(e)(4) rejection. Had the Examiner considered the cases cited by Applicant, she would have registered Applicant's mark based on the fact that the consuming public does not view Applicant's mark as primarily merely a surname. *See Ex Parte Omaha Cold Storage Co.*, 111 U.S.P.Q. 189, 1956 WL 7069 (Comm'r Pat. & Trademarks 1956); *Ex Parte Gemex Company*, 111 U.S.P.Q. 443, 1956 WL 7120 (Comm'r Pat. & Trademarks 1956); *In re United Distillers plc.*, 56 USPQ2d 1220, 21 (TTAB 2000); *In re Lorch Schweißtechnik GmbH*, Serial No. 85037839 (November 29, 2012) (not precedential); *In re G R Lane Health Products Limited*, Serial No. 85115445 (July 10, 2013) (not precedential); *In re Okamoto Corp.*, Serial No. 85739429 (February 6, 2015) (not precedential).

As such, the Examining Attorney has not met its burden for establishing a prima facie case.

B. When balanced, the *Benthin* factors show that Applicant's mark is not "primarily merely a surname" within the meaning of Section 2(e)(4).

Should the Board find that the Examining Attorney had met its burden in establishing a prima facie case that the RICHTER mark is primarily merely a surname, the burden shifts to the Applicant to rebut this showing. TMEP § 1211.02(a); *see In re Petrin Corp.*, 231 USPQ 902, 902-03 (TTAB 1986); *see also In re Kahan & Weisz Jewelry Mfg. Corp.*, 184 USPQ 238 (CCPA 1975). Here, Applicant can demonstrate the RICHTER mark is not primarily merely a surname through a balancing of the *Benthin* factors.

The Board identified five factors to consider in determining whether a mark is primarily merely a surname: (1) The degree of the surname's "rareness"; (2) Whether anyone connected

with the applicant has the involved term as a surname; (3) Whether the mark has any recognized meaning other than as a surname; (4) Whether the mark has the “look and sound” of a surname; and (5) whether the manner in which the mark is displayed might negate any surname significance. *In re Benthin Management GmbH*, 37 USPQ2d 1332, 1334 (TTAB 1995). On the issue of whether a mark is primarily merely a surname under Section 2(e)(4), any doubts must be resolved in favor of the applicant. *In re Isabella Fiore, LLC*, 75 U.S.P.Q.2d 1564, 2005 WL 1787224 (T.T.A.B. 2005) (“Our case law holds that if we have doubts about whether the term is a surname, we resolve them in favor of the applicant and for publication of the mark.”).

In this case, the second factor is weighs in favor of a finding that the mark is primarily merely a surname, as the Examiner noted that the Applicant’s founders are Brandon and April Richter. November 18, 2014 Office Action, TSDR 104-112. The fifth factor is neutral in this case because Applicant’s mark is in standard characters. Nevertheless, the other three *Benthin* factors weigh in favor of a finding that Applicant’s mark is “not primarily merely a surname”.

1. Richter is a rare surname.

The test for determining whether a mark is primarily merely a surname is the *primary significance of the mark as a whole to the purchasing public*. *In re Okamoto Corp.*, Serial No. 85739429 (February 6, 2015); see also *In re United Distillers plc.*, 56 USPQ2d 1220, 21 (TTAB 2000) (“Hackler” held to be a rare surname despite 1295 listings in phone directories).

On several occasions, the Board has found a surname to be rare despite the volume of evidence an Examiner has provided in refusing registration of a mark for being primarily merely a surname. For example, in *In re Lorch Schweißtechnik GmbH*, Serial No. 85037839 (November 29, 2012) (not precedential), the Trademark Trial and Appeal Board found that 470 listings for the name "Lorch" made for an "extremely rare surname." Additionally, a nationwide telephone

listing revealed 87 listings for individuals with the surname JAKEMAN was deemed a rare surname for purposes of a Section 2(e)(4) evaluation. *In re G R Lane Health Products Limited*, Serial No. 85115445 (July 10, 2013) (not precedential). Further, in *In re Okamoto Corp.*, Serial No. 85739429 (February 6, 2015) (not precedential), the Trademark Trial and Appeal Board reversed a 2(e)(4) rejection despite the examining attorney's evidence of 739 Lexis listings for the surname "Okamoto," 33 Internet excerpts referencing persons with that surname, and pointed to the fact that the applicant's president is named Mr. Tetsuji Okamoto.

In context of the record, "Richter" is a rare surname. The Examining Attorney notes that "Richter" appears 100 times in a nationwide telephone directory and 43,963 times in a LexisNexis nationwide public records search. September 29, 2014 Office Action, TSDR 2-10; May 21, 2015 Reconsideration Letter. The Examiner's second search of public records was presented in the Denial for Reconsideration, which did not avail the Applicant to respond to this evidence. May 21, 2015 Reconsideration Letter, TSR 1. Regardless, Applicant notes that these public records could signify a number of records, including birth and marriage records. But the record should be limited in weight, as the records also consist of death records that matched the birth records, and not account for divorces, changes in addresses, etc. These records also include duplicate entries for individuals, such as the case for entries 4-8, 65-66, 94-99, etc. So, at most, 43,963 figure signifies that 0.01379% of the U.S. population hold the "Richter" surname, which in no means makes it common. This makes the "Richter" surname rare in comparison to the progeny of 2(e)(4) cases.

In terms of notoriety of individuals with the last name "Richter", the Examiner provided 4 pieces of evidence. November 18, 2014 Office Action, TSDR 29-36. While these individuals are noteworthy, they are not household names. Their names are not so widely circulated in the

media that the consuming public would be familiar with the “Richter” surname in a way that would outweigh the rarity of the surname.

Further, the one arguably ‘famous’ Richter is Charles Francis Richter, a seismologist who lent his name to the Richter scale. November 18, 2014 Office Action, TSDR 24-26.

Nonetheless, many items on the record demonstrate the familiarity of the public with the Richter scale, but these sources do not even cite the founder, or if they do, he is mentioned briefly in a footnote. October 27, 2014 Office Action Response, Exhibits C-D.

As such, the record reflects the rarity of the “Richter” surname. Thus, this factor weighs against a finding that it is primarily merely a surname.

2. Richter has various meanings other than as a surname.

Case law indicates that marks with multiple meanings the relevant purchasing public may recognize in addition to surname significance warrant registration. *Ex Parte Omaha Cold Storage Co.*, 111 U.S.P.Q. 189, 1956 WL 7069 (Comm'r Pat. & Trademarks 1956).

For example, in *Ex Parte Omaha Cold Storage Co.*, the mark DOUGLAS was held to be not primarily merely a surname because, in addition to being a surname, it was also the name of a Scottish clan, the name for a number of cities and counties, the name of a street in many localities, a species of fir tree, and a species of squirrel. 111 U.S.P.Q. 189.

In *Ex Parte Gemex Company*, 111 U.S.P.Q. 443, 1956 WL 7120 (Comm'r Pat. & Trademarks 1956), the Board held WELLINGTON is not primarily merely a surname because it is a surname. The Board noted that the surname was also: a geographical name, being the national capital of New Zealand and the name of a number of towns in the United States; it is a baptismal name; and it is the name of one of Great Britain's most important dukedoms. The

Board noted there is no way of knowing what the impact on the purchasing public is likely to be upon seeing ‘WELLINGTON’ watch bracelets and straps.

Applicant has provided ample evidence of other meanings of “Richter”.

First, the Richter Magnitude Scale is a very well known reference that outweighs any surname significance. While the Examining Attorney points out that the Richter Magnitude Scale in fact takes its name from an individual with the surname Richter, there is no indication that the purchasing public is likely to be aware of that fact or has assigned such significance to it.

Second, when searching the term “Richter” in Wikipedia generally the results pages bears no less than eleven possible articles bearing the title. A few reference individuals with the surname “Richter,” but there are a number of alternatively recognized meanings. These including a city in Kansas, an electro-rock band from Buenos Aires, Argentina, a tuning scale for harmonicas developed in 1825, a pharmaceutical company, a German toy company, a song by The Ziggens (a California-based band), and a disease involving complication of blood-related neoplasms, outweighs the surname significance when combined with the rareness of the name generally. May 15, 2015 Request for Reconsideration, Exhibit B.

Further, “richter” is the German word for “judge”. October 27, 2014 Office Action Response Exhibit F; November 18, 2014 Office Action, TSDR 47-48.

As such, the record reflects the primary significance of the RICHTER mark is something other than that of merely a surname, which the consuming public would readily be aware of. Thus, this factor weighs against a finding that it is primarily merely a surname.

3. Richter does not have the “look and sound” of a surname.

Applicant respectfully submits that RICHTER does not have the structure and pronunciation of a surname.

The Examiner herself has demonstrated the mark does not have the “look and sound” of a surname. Specifically, she repeatedly misspelled the mark in her third-party internet searches. She provided several pieces of evidence of the surname RITCHER, which is not the Applicant’s mark. November 18, 2014 Office Action, TSDR 2-23.

As such, this factor weighs in favor of a finding that the RICHTER mark does not have the “look and sound” of a surname.

4. Summation of the balancing the *Benthin* factors.

Thus, the first, third and fourth *Benthin* factors weigh against a finding the mark is primarily merely a surname. The second factor weighs in favor of a finding that the mark is primarily merely a surname. The fifth factor is neutral.

In sum, the *Benthin* factors weigh against a finding that the RICHTER mark is not primarily merely a surname.

III. Conclusion

For the foregoing reasons, Applicant respectfully requests that the TTAB reverse the Examiner’s refusal to register and order the registration of the mark.

Respectfully Submitted,

Date: July 20, 2015

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CERTIFICATE OF ELECTRONIC DEPOSIT

I hereby certify that a true and complete copy of the foregoing EX PARTE APPEAL APPLICANT'S BRIEF is being electronically deposited on this 20th day of JULY 2015, via the Electronic System for Trademark Trials and Appeals website.

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